Filed 2/25/05 P. v. Saravia CA2/1

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE, Plaintiff and Respondent, v. CARLOS SARAVIA, Defendant and Appellant.	B171481 (Los Angeles County Super. Ct. No. BA251005)

APPEAL from a judgment of the Superior Court of Los Angeles County, Barbara R. Johnson, Judge. Affirmed.

Laura G. Schaefer, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Pamela C. Hamanaka, Senior Assistant Attorney General, Robert F. Katz, Supervising Deputy Attorney General and Louis W. Karlin, Deputy Attorney General, for Plaintiff and Respondent.

INTRODUCTION

Defendant Carlos Saravia appeals from a judgment of conviction entered after a jury found him guilty of making criminal threats (Pen. Code, § 422), with a true finding that he personally used a deadly and dangerous weapon (*id*., § 12022, subd. (b)), and resisting arrest (*id.*, § 148, subd. (a)(1)). The court thereafter sentenced defendant to state prison for a term of five years, the three-year upper term on the criminal threats conviction, plus a consecutive one-year term for the resisting arrest conviction, enhanced by one year for personal knife use.

Defendant claims instructional and sentencing error. Inasmuch as we find no merit in defendant's contentions, we affirm the judgment.

FACTS

Defendant had lived with Mirna Pena (Pena) as her boyfriend. However, he left California in 2001. Pena did not hear from him until 2003. In July of that year, defendant moved into Pena's Los Angeles apartment.

On July 25, Pena left her apartment for two days without telling defendant where she was staying. She was afraid. Defendant and Pena had been arguing and defendant said to her, "If I can't have you, no one will. I will kill you."

When Pena returned on July 27, Pena and defendant started arguing. Defendant went into the kitchen and got a knife. He then approached Pena in the bedroom. Defendant cut his wrist and then stabbed the bed, on which Pena was sitting, causing the knife to bend. Defendant went back into the kitchen and picked up another knife. He dialed 9-1-1 and gave the telephone to Pena. Pena told the operator that defendant had dialed the police and then she immediately hung up the telephone. Defendant then said to Pena, "If the police come, they won't take me alive. I'll kill you first, and then I'll kill myself." Pena was afraid for her personal safety and that defendant might commit suicide.

About 11:00 a.m., Los Angeles Police Officer Martin Espinoza and his partner responded to a "9-1-1 hang-up" call at Pena's apartment. Officer Espinoza knocked at the door and Pena ran out with her arms in the air, crying, and very hysterical. Pena screamed at the officer, "He's got a knife. He's trying to kill me." Pena then told the officer that during an argument regarding defendant's jealousy, defendant produced a knife and threatened to kill her and himself. Defendant remained in the apartment and refused to come out. After about one and one-half to two hours, defendant left the apartment and was arrested.

CONTENTIONS

Defendant contends the trial court erred by failing to instruct the jury sua sponte on the lesser included offense of attempted criminal threats. We disagree.

Defendant contends the trial court deprived him of a jury trial and proof beyond a reasonable doubt when it made factual findings to impose a sentence based on the upper term. Again, we disagree.

DISCUSSION

Attempted Criminal Threats Instruction

Defendant contends the trial court failed to instruct the jury on the lesser included offense of attempted criminal threats. He argues that there was substantial evidence to support a finding that his threats did not cause Pena to suffer sustained fear, based on her supposed testimony that she was solely afraid for defendant's own safety, not her own. However, that was not Pena's trial testimony.

The trial court instructed the jury with CALJIC No. 9.94, criminal threats.[1] Defendant never sought an instruction on the offense of attempted criminal threats. An attempted criminal threat is a lesser included offense of making a criminal threat. (*People v. Toledo* (2001) 26 Cal.4th 221, 230, 235.) An attempted criminal threat occurs if a defendant "orally makes a sufficient threat directly to the threatened person, but for some reason the threatened person does not understand the threat . . . . Further, if a defendant, again acting with the requisite intent, makes a sufficient threat that is received and understood by the threatened person, but, for whatever reason, the threat does not *actually* cause the threatened person to be in sustained fear for his or her safety even though, under the circumstances, that person reasonably could have been placed in such fear, the defendant properly may be found to have committed the offense of attempted criminal threat." (*Id.* at p. 231.)

The legal standard for determining when a court must instruct sua sponte on a lesser included offense is well established. "[A] trial court errs if it fails to instruct, sua sponte, on all theories of a lesser included offense which find substantial support in the evidence. On the other hand, the court is not obliged to instruct on theories that have no such evidentiary support." (*People v. Breverman* (1998) 19 Cal.4th 142, 162.) Furthermore, "the existence of '*any* evidence, no matter how weak' will not justify instructions on a lesser included offense, but such instructions are required whenever evidence that the defendant is guilty only of the lesser offense is 'substantial enough to merit consideration' by the jury. [Citations.] 'Substantial evidence' in this context is

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[1] CALJIC No. 9.94 provides, in relevant part: "Every person who willfully threatens to commit a crime which will result in death or great bodily injury to another person, with the specific intent that the statement made verbally, in writing, or by means of an electronic communication device, is to be taken as a threat, even if there is no intent of actually carrying it out, which threat, on its face and under the circumstances in which it is made, is so unequivocal, unconditional, immediate, and specific as to convey to the person threatened, a gravity of purpose and an immediate prospect of execution of the threat, and thereby *causes that person reasonably to be in sustained fear for his or her own safety* . . . , is guilty of a violation of Penal Code § 422, a crime." (Italics added.)

‘“evidence from which a jury composed of reasonable [persons] could . . . conclude[]’” that the lesser offense, but not the greater, was committed. [Citations.]” (*Ibid.*) Accordingly, we consider whether there was substantial evidence in this case to support a verdict of attempted criminal threats.

No substantial evidence supported the theory that defendant committed only an attempted criminal threat. The evidence showed sustained and reasonable fear on Pena’s part. Her demeanor and statements, as witnessed by Officer Espinoza, decisively showed that Pena was in actual fear of defendant. On direct and cross-examination, Pena made it clear she was afraid for her own safety. When the prosecution asked why she ran from defendant when the officers arrived, Pena stated, “Because of the words he had said to me before, I was afraid that he was going to get me right there.” Pena consistently testified that she was afraid for her own safety as well as for defendant’s: “I was concerned that he might do something to himself or to me.” Even if Pena testified to her concern for defendant’s safety, she testified
to concern for her own safety as well. In light of the overwhelming evidence of her actual fear, that testimony cannot be deemed substantial in character.

However, defendant points to Pena’s testimony at the preliminary hearing that she was not fearful for her life, she was fearful for defendant’s life, because she thought he was going to kill himself. Defendant argues, given the conflicting evidence regarding whether Pena actually suffered sustained fear, the trial court should have given the jury the option of convicting defendant of the lesser included offense of attempted criminal threat.

Assuming arguendo error in not giving the instruction, it was harmless. No trier of fact would have found, based on the evidence presented at trial, that Pena was not in fear for her life. Reversal is only warranted if it is reasonably probable defendant would have received a more favorable verdict had the error not occurred. (*People v. Breverman, supra,* 19 Cal.4th at p. 178; *People v. Watson* (1956) 46 Cal.2d 818, 836.) Here it is not.

Sentencing

The trial court imposed the three-year upper term sentence on defendant's criminal threats conviction[2] but did not explain its reason for imposing the upper term. However, the probation report listed two factors in aggravation: The crime involved great violence and great bodily harm (Cal. Rules of Court, rule 4.421(a)(1)), and defendant's prior crimes were numerous and appeared to be escalating in seriousness (*id.,* rule 4.421(b)(2)). We can assume that the trial court reviewed and relied on the portion of the probation report regarding prior convictions in imposing sentence.

In *Apprendi v. New Jersey* (2000) 530 U.S. 466, the United States Supreme Court held that "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." (*Id.* at p. 490.) In *Blakely v. Washington* (2004) 542 U.S. ___ [124 S.Ct. 2531], the nation's highest court clarified its holding in *Apprendi*. *Blakely* held "that the 'statutory maximum' for *Apprendi* purposes is the maximum sentence a judge may impose solely on the basis of the facts reflected in the jury verdict or admitted by the defendant." (At p. ___ [124 S.Ct. at p. 2537], italics omitted.)

In reliance upon *Blakely*, defendant argues that the trial court deprived him of his Sixth Amendment right to a jury trial when it imposed the upper term.[3] In defendant's

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[2] Defendant was sentenced to a total of five years in state prison: a three-year upper term on the criminal threats conviction, plus a consecutive one-year term for the resisting arrest conviction, enhanced by one year for personal knife use.

[3] The People claim that defendant's contention under *Blakely* has been waived by his failure to raise it below. As a general rule, claims of sentencing error involving factual questions or an exercise of discretion by the trial judge must be raised below or they are waived. (*People v. Scott* (1994) 9 Cal.4th 331, 351-352.) This rule applies to claims of constitutional error as well. (*People v. Marchand* (2002) 98 Cal.App.4th 1056, 1060-1061.)

An exception to this rule arises when a claim of error is based on an opinion decided *after* defendant was sentenced. (*People v. Cleveland* (2001) 87 Cal.App.4th 263, 268, fn. 2.) The People argue this exception does not arise here, even though *Blakely* was decided after defendant's sentencing, in that *Apprendi* was decided several years earlier.

view, the judgment must be reversed and the matter remanded for resentencing. Assuming arguendo that *Blakely* applies to California's sentencing scheme, defendant has failed to demonstrate that he is entitled to relief.

The requirement that a fact used to increase a sentence beyond the statutory maximum must be found by a jury is inapplicable to the fact of a prior conviction. The prior conviction exception to the *Apprendi* rule has been construed broadly, applying not only to the fact of the prior conviction but to other issues relating to the defendant's recidivism. (*People v. Earley* (2004) 122 Cal.App.4th 542, 549-550, review den. Nov. 10, 2004; accord, *People v. Thomas* (2001) 91 Cal.App.4th 212, 221-222, review den. Oct. 31, 2001.) Thus, "full due process treatment of an issue of recidivism which enhances a sentence and is unrelated to an element of a crime" is not required. (*Thomas, supra,* at p. 223.)

In this case, the trial court stated no aggravating factors but the probation report, presumably read by the trial court, listed two aggravating factors and no mitigating factors. One was based on defendant's prior convictions—defendant had an extensive adult record, and his crimes appeared to be escalating in seriousness.

The trial court's consideration of defendant's criminal history related to defendant's recidivism. Inasmuch as facts relating to recidivism are included within the *Apprendi* exception, the trial court properly relied upon such facts in imposing the upper term on defendant's criminal threats conviction. (*United States v. Booker* (2005) 543 U.S. ___, ___ [125 S.Ct. 738, 748]; *Blakely v. Washington, supra,* 542 U.S. at p. ___ [124 S.Ct. at p. 2536]; *Apprendi v. New Jersey, supra,* 530 U.S. at p. 490; *Almendarez-*

In our view, the Supreme Court's decision in *Apprendi* did not give defendant notice that he had a claim that his upper term sentence was invalid. Not until *Blakely* was defendant apprised that "the relevant 'statutory maximum' is not the maximum sentence a judge may impose after finding additional facts, [i.e., the upper term sentence prescribed for the crime,] but the maximum he may impose without any additional findings." (*Blakely v. Washington, supra,* 542 U.S. at p. ___ [124 S.Ct. at p. 2537], italics omitted.) Accordingly, we find no waiver of defendant's *Blakely* claims. (*People v. Cleveland, supra,* 87 Cal.App.4th at p. 268, fn. 2.)

Torres v. United States (1998) 523 U.S. 224, 247.) No sentencing error has been demonstrated.

The judgment is affirmed.

NOT TO BE PUBLISHED.

SPENCER, P. J.

I concur:

MALLANO, J.

I concur in the judgment only:

VOGEL, J.